Review of the Scottish Code of Good Higher Education Governance

Summary of the Steering Group's response to consultation submissions

October 2017

When the Scottish Code of Good Higher Education Governance was first published, in 2013, the Committee of Chairs of Scottish Higher Education Institutions (informally, the Committee of Scottish Chairs, or CSC) made a commitment to review the Code after three years. Accordingly, in 2016 the CSC commissioned an expert steering group to conduct an evidence-based review and to revise the Code as appropriate.

In May-June 2017, the review steering group issued a draft revised Code for open public consultation. The consultation was publicised widely across the higher education sector and all respondents to the previous year's evidence-gathering consultation were invited to submit a response.

In total, 27 responses were received; these can be found at www.scottishuniversitygovernance.ac.uk.

The following summary is not exhaustive. It concentrates on the major themes that emerged from the consultation and any changes made to the Code in relation to these major themes. A number of more detailed changes were suggested and/or made, which are not listed here.

The points below should be considered in the context of the guiding principles which the steering group drew from the initial, evidence-gathering consultation:
- The task of the group was to revise the 2013 Code, not to replace it with an entirely new document. The majority of the content of the 2013 Code was to be retained, subject to addressing certain important issues.
- The revision should improve the clarity of the Code and its overall presentation.
- The revision should ensure compatibility with the HE Governance Act (Scotland) 2016, but should not attempt to impose an interpretation on that Act, nor to reproduce it redundantly.

Overall approach and tone

Many of the consultation responses welcomed the draft Code's new structure as an improvement in clarity and readability. Audit Scotland noted that, overall, "[we] believe the current draft provides a strong basis for supporting effective governance in higher education institutions".

Many responses, in particular those from Higher Education Institutions (HEIs), found the tone of the draft Code to be excessively prescriptive. The draft Code's new and systematic use of *must* and *should*, which was not found in the 2013 Code, was felt by these respondents to be too heavily weighted in the direction of *must* statements. This was argued to be contrary to the spirit of the Code, as a document that aims to stimulate best practice rather than merely impose a 'check-box' compliance approach.

The steering group responded to these concerns by introducing a more nuanced scheme of statement types, while retaining the advantages of a systematic approach. The binary *must* / *should* distinction was replaced with a three-way system of *must* / *expected to* / *should* and all the terms used within this were redefined. Each statement in the Code was revisited in the light of these new definitions and re-worded accordingly. In total, around 95 uses of *must* were removed from the Code and its overall tone was adjusted significantly, without compromising its content.

As with the 2013 Code, the entire document is issued on a 'comply or explain' basis. The new systematic and balanced use of language helps to indicate exactly how each part of the Code interacts with this overarching approach.

Length

Some consultation responses argued that the consultation draft was too long for a Code of Governance. As some others recognised, the consultation draft of the revised Code was in fact significantly shorter than the 2013 Code. Nevertheless, further efforts were made to reduce the text after the consultation. The removal of an annex (see below) reduced the word count by 475 and a further 185 words were excised from the main text. The revised Code is shorter than the 2013 Code by more than 1,530 words, even when annexes and forewords are not counted.

Removal of requirements beyond the subject's control

A small number of statements in the consultation draft, some drawn from the 2013 Code, were of the form 'X must ensure that Y'. A number of consultation respondents pointed out that, if interpreted literally, this could place unreasonable demands on the relevant person or body (X), especially where the outcome (Y) depends on the actions of some other party. It is reasonable for a Code to require that someone takes steps to bring about a given outcome, but that outcome cannot always be guaranteed, however diligently it is pursued.

All such statements were changed so that the Code now requires only actions that are within the control of the relevant actor.

Nominations committee chair

The submissions from the trade union Unite and from the University of St Andrews questioned the need for the chair of the governing body to chair the nominations committee. The University of St Andrews noted that their practice of using a fully external nominations committee chair had been commended as good practice both by SFC and by an independent report. In this context, the Code was changed to leave open different possible arrangements for chairing this committee.

'Restricted business' and conflict of interest

Several respondents questioned the need for, or appropriateness of, paragraph 49 in the consultation draft. This paragraph was drawn from the 2013 Code. It discussed the possibility, within strict limits, of restricting certain kinds of governing body business such that not all governing body members could take part in it. Respondents from diverse points of view felt that the purpose of the paragraph and the scope of its application were not clear.

In the light of these comments, the steering group concluded that conflict of interest provisions should be sufficient to cover any issue that would be appropriately dealt with by anything less than the whole governing body. The consultation draft's paragraph 49 was therefore removed. In conjunction with this, small amendments were made to existing provisions on conflict of interest, to clarify that a range of actions is available where a conflict of interest is recognised – from complete removal of the

governing body member in question for the relevant business, to participation that stops short of voting or decision-making – and that these measures should be applied proportionately.

Audit committee membership

One of the aims of the steering group, following the review's evidence-gathering phase, was to clarify and emphasise the shared responsibilities of all governing body members. As part of this, the revised Code contains a provision on committee membership which states that, other things being equal, no governing body member should be precluded from membership of a committee purely on the basis of the 'category' of governing body member that they represent.

The consultation draft included audit committees under the scope of this general statement. A large number of consultation responses pointed out that this brought the Code into conflict with existing guidance on audit committees. Most notably, the UK-level CUC *Handbook for Members of Audit Committees in Higher Education Institutions* states that "All members of the committee should be independent, objective and non-executive."

To avoid this conflict, the Code now explicitly recognises audit committees as exceptions to the general principle that category of governing body membership should not be a bar to committee membership.

Equality and Diversity section

The 2013 Code contained significant statements on equality and diversity, but these were distributed around the text. A clear message drawn from the review's evidence-gathering phase was that it would be preferable for the Code to have a dedicated section on this topic, reflecting its wider importance.

This new section attracted a number of comments in the consultation. A number of submissions noted that references to the CSC's existing gender balance commitment could easily become obsolete given relevant current developments in wider public policy. More generally, a range of opinions was expressed on whether the Code should endorse any particular gender balance target and, if so, of what nature. While some respondents argued for strengthened targets and commitments, others expressed a concern that the inclusion of highly specific material on gender balance could imply a deprioritising of other protected characteristics.

In response, the section was thoroughly reviewed. Reference to the CSC's gender balance commitment was retained, but in the form of a footnote which makes clear that this is merely the relevant point of reference at the time of the Code's publication. In general, the thrust of the section, as revised, is to emphasise governing bodies' responsibilities, which include maintaining appropriate goals and policies and monitoring progress against these. The text makes clear that gender balance remains a priority but also that it should be considered alongside other equality and diversity issues.

Another concern of some respondents was that detailed statements in the Code could potentially run into conflict with or duplicate the requirements of equalities legislation. While this section of the Code does re-state some legislative requirements, as context for other provisions of the Code, a footnote now makes clear that compliance with the Code does not necessitate duplication of existing reporting requirements.

Register of gifts and hospitality

The consultation draft contained a paragraph on maintaining a public register of gifts and hospitality offered to governing body members. This was based on Audit Scotland's submission to the original evidence-gathering phase of the review. A number of consultation responses argued that this was too broadly stated and that it was at least partly redundant, given existing anti-corruption law.

Comparable codes do not contain such requirements. Given that the higher education governance has not experienced particular problems in this area, there seems no motivation to introduce an unusually strong statement on the matter in this Code. The text was revised to require 'robust and comprehensive' institutional policies on gifts and hospitality. This still represents a significant addition relative to the 2013 Code, which did not mention gifts and hospitality registers.

HEIs' responsibilities regarding their student associations

One respondent suggested that the Code should include material on HEIs' responsibilities towards local student associations, in terms of both resourcing and oversight. Although the latter responsibilities follow from the Education Act 1994, the steering group agreed that it would appropriate for the Code to cover these aspects of a governing body's responsibilities, which are similarly mentioned in the CUC code and the Scottish colleges' governance code. Relevant material was therefore added as paragraph 6 of the revised Code.

Simplified reporting requirements

A number of responses from HEIs questioned detailed reporting requirements in the consultation draft. For example, in some cases, it was unclear whether certain information found in the institution's annual report would have to be separately posted on a webpage. The text was changed to make clear that such duplication of reporting is never required by the Code, given that annual reports are themselves required to be published on institutional websites.

Most HEIs' responses questioned a requirement for institutions to include a statement in their annual reports on the size and composition of the governing body, including an explanation of any increase in the size of the governing body. These respondents argued that this requirement was overly specific, given the nature of the Code, and constituted an unnecessary increase to the overall reporting burden.

The specific requirement to explain increases in the governing body's size has been dropped. It is envisioned that the remaining requirement can be fulfilled through a brief statement within the information on governance that is independently required in each institution's annual report. Therefore, this should not constitute a significant increase in administrative burden.

References to ethical and sustainable behaviour

Broadly speaking, the consultation draft drew two kinds of comment on this matter (as covered in paragraphs 9 and 10 of the consultation draft), which were to some extent in conflict with each other. In response, the relevant material has been re-written in a more concise form and with a clearer indication of the duties placed on governing bodies.

One concern expressed in a number of HEIs' responses was that the terms 'ethical and sustainable' were not sufficiently clearly defined, leaving it unclear what would constitute compliance with this part of the Code. The steering group took the view that it would be inappropriate for a Code to impose highly detailed requirements, here as in other parts of the document, but accepted that this terminology was problematic in the context of a requirement to 'ensure' such behaviour. As noted above, such uses of 'ensure' have since been removed throughout the Code.

At the same time, a number of consultation responses objected to details within the relevant paragraphs. Citation of the Fair Work Framework was argued to be inappropriate, as this led the Code into areas of management rather than governance and made it dependent on the contents of an external document. Direct reference to the Framework was removed, but the relevance of fair work to ethical and sustainable policies and actions is still stated explicitly.

Another specific issue mentioned by a number of different respondents was the consultation draft's requirement for institutions to aim to contribute to economic development. The steering group accepted the point that contributing to economic development is a consequence of HEIs' pursuit of their core activities and that perverse outcomes could follow from pursuing it as an aim in itself. The relevant statement has been removed.

Academic freedom and academic boards

A number of consultation responses pointed out that the consultation draft was legally inaccurate in suggesting that responsibility for academic freedom lies with academic boards. While academic boards will commonly have an important role to play in this matter, it follows from the Higher Education Governance (Scotland) Act 2016 that responsibility for academic freedom ultimately resides with the governing body. Since this responsibility is already defined in detail in that legislation, this reference was removed from the Code entirely.

Annex: the Nine Principles of Public Life in Scotland

One respondent objected to fact that the Nine Principles of Public Life in Scotland had been amended in the annex to the consultation draft. Some details had been amended in order to convert a document written for the public sector into one suitable for use in the higher education sector. The steering group accepted the argument that it was preferable not to amend a standard, established document of this kind, but also noted that not doing so would mean that some details of the annex were incongruous in a Code for higher education institutions. The annex was therefore removed, but the Principles remain explicitly a key point of reference for governing body members.